No. 83-1197

In The

Supreme Court of the United States

October Term, 1983

GERALD A. MASON, *et al.*,

Petitioners,

vs.

BURGER KING CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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CHAS. P. YOUNG CHICAGO, INC.

QUESTIONS PRESENTED

1. Did the Court of Appeals properly affirm the District Court's exercise of its discretion in ordering a partial new trial on an issue which was distinct and separable from the other issues (all of which other issues had been resolved by the jury's unequivocal responses to various special interrogatories)?

2. Did the Court of Appeals properly affirm the District Court's exercise of its discretion in ordering a new trial with respect to an issue that was the subject of a special interrogatory to which the jury responded ambiguously?

LIST OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

Pursuant to Rule 28.1 of the Rules of this Court, respondent Burger King Corporation states that its parent corporation is The Pillsbury Company. It has no subsidiaries, other than wholly-owned subsidiaries. Its affiliated companies, excluding wholly-owned affiliates, are Chemicals, Marketing and Transportation Company, Inc., Midwest Processing Co., Sportman's Recipes, Inc., New Company Limited [Bahamas], Inversiones Diversas S.A. [El Salvador], Molinas De El Salvador, S.A. [El Salvador], Almacendora Centroamerican, S.A. [El Salvador], Gringoire-Brossard S.A. [France], Singapour Patissier S.A. [France], Seretram [France], Jamaica Flour Mills Ltd. [Jamaica], Snow Brand Pillsbury Inc. [Japan], Molinos Modernos, S.A. [Guatemala], Alimentos Cora S.A. de C.V. [Mexico], Grupo Olazabal-Pillsbury, S.A. de C.V. [Mexico], Molinos Los Cantabros, S.A. de C.V. [Mexico], Pillsbury Mindanao Flour Milling Co. Inc. (Pilmico) [Philippines], Amoy Industries (International) Ltd. [Hong Kong].

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit (Pet. App. A1) is reported at 710 F.2d 1480. The Court of Appeals' denial of rehearing is reported at 718 F.2d 1115. The District Court's December 30, 1980 order denying Petitioners' motion for a plenary new trial (Pet. App. A121) and the District Court's October 31, 1980 order directing a new trial with respect to the termination of certain franchise agreements (Pet. App. A47) are unreported.

JURISDICTION

The decision of the Court of Appeals for the Eleventh Circuit is dated August 1, 1983. The Eleventh Circuit denied Petitioners' petition for rehearing (with suggestion of *en banc* consideration) on October 14, 1983, in an order which stated that no member of the panel and none of the regular active judges of the Circuit had voted in favor of rehearing. The

petition for a writ of certiorari was filed on December 29, 1983. Petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATEMENT

This action involves a series of controversies between Petitioners (defendants in the trial court) and Respondent Burger King Corporation (plaintiff in the trial court). Those controversies arose out of contractual relationships pursuant to which Burger King Corporation had licensed Petitioners to develop and operate Burger King restaurants at certain specified locations.

Burger King Corporation's complaint asserted three general categories of claims against Petitioners:

1. Burger King Corporation sought to recover approximately $1,600,000 which Petitioners owed to it on five promissory notes and on certain accounts receivable.

2. Burger King Corporation sought an adjudication that it had properly terminated two written Development Agreements pursuant to which Petitioners had agreed to develop Burger King licensed restaurants in the Pittsburgh and Kansas City areas in accordance with specified development schedules; Burger King Corporation had terminated those two Development Agreements because Petitioners had committed various acts which the Development Agreements expressly specified as acts of default constituting grounds for termination.

3. Burger King Corporation sought an adjudication that it had properly terminated 27 franchise agreements, each of which had licensed Petitioners to operate a Burger King restaurant at a particular location; Burger King Corporation terminated those franchise agreements because Petitioners had committed various

acts which the franchise agreements expressly specified as acts of default constituting grounds for termination.[1]

Petitioners' twelve-count counterclaim against Burger King Corporation alleged fraud, undue economic coercion, malicious interference with business relationships, violations of the federal antitrust laws, improper termination of the two written Development Agreements, and breaches of certain alleged oral development agreements.

The case was tried to a jury in the summer of 1980. That trial resulted in the following adjudications:

1. In response to the special interrogatories relating to Burger King Corporation's claims on the promissory notes and the accounts receivable, the jury found that Burger King Corporation had prevailed, and that Petitioners had failed to establish any of their affirmative defenses to those claims. That finding was consistent with the jury's findings (in its responses to other special interrogatories) that Petitioners also had failed to establish any of the counterclaims which were essentially identical to Petitioners' affirmative defenses. However, the jury's responses to the special interrogatories which related to the promissory notes and the accounts receivable awarded Burger King Corporation "damages" which were, in the trial court's words, "contrary to the weight of the evidence presented at trial". October 31, 1980 Order, Pet. App. A48. Accordingly, the trial court ordered a new trial with respect to the amount of Burger King Corporation's recovery on the promissory notes and the accounts receivable. *Id.* That ruling is discussed in greater detail *infra*, pp. 5-8.

[1] In addition, Burger King Corporation sought money damages and injunctive relief by reason of the fact that Petitioners had continued to use its trademarks and service marks following the termination of the franchise agreements whereby Petitioners had been licensed to use those marks.

2. The jury found unequivocally that Burger King Corporation had properly terminated the Pittsburgh and Kansas City Development Agreements; Petitioners did not challenge those findings in the Eleventh Circuit or in their petition to this Court.

3. The jury's response to the special interrogatory relating to the termination of Petitioners' 27 franchise agreements was ambiguous. The trial court subsequently concluded that the jury's response to that special interrogatory constituted a finding that Burger King Corporation had improperly terminated the twelve franchise agreements covering restaurants in the Pittsburgh area; the trial court upheld that finding. October 31, 1980 Order, Pet. App. A48-49. However, the trial court ordered a new trial to determine whether Burger King Corporation had properly terminated each of Petitioners' other fifteen franchise agreements. *Id.* at A48-A49. That ruling is discussed in greater detail *infra*, pp. 8-11.

4. Each of the claims asserted in Petitioners' counterclaim was either (a) expressly rejected by the trial court (which granted Burger King Corporation's motions for directed verdicts on several of the claims asserted in Petitioners' counterclaim), (b) expressly rejected by the jury in its responses to special interrogatories, or (c) dismissed voluntarily by Petitioners.

Petitioners did not challenge, either by motion in the trial court or in their appeal to the Eleventh Circuit, the responses to the special interrogatories by which the jury had rejected the claims asserted in Petitioners' counterclaim. Thus Petitioners have conceded that the jury's responses to those special interrogatories were amply supported by the evidence. However, Petitioners urged both the trial court and the Court of Appeals to order a plenary new trial with respect to Petitioners' affirmative defenses to Burger King Corporation's claims on the promissory notes and the accounts receivable—even though those affirmative defenses

were essentially identical to the claims which Petitioners had advanced in four counts of their counterclaim, each of which had been expressly rejected by the jury's responses to various special interrogatories.

1. Each of the two special interrogatories relating to Burger King Corporation's claims on the promissory notes and the accounts receivable directed the jury to select one of two alternative verdicts—*i.e.*, Alternative A, which stated that "BURGER KING CORPORATION has prevailed, and we award BURGER KING CORPORATION damages in the amount of $," or Alternative B, which stated that "Defendants have established one or more of their affirmative defenses and are not liable to BURGER KING CORPORATION on the five December 28, 1976 promissory notes [or for royalties, rent, advertising fund contributions, and for purchases of equipment, materials and supplies]". Special Issues Nos. 1 and 2, C.A. App. Ex. A, B.[2]

In its response to each of those special interrogatories, the jury selected Alternative A, which stated that "BURGER KING CORPORATION has prevailed", and rejected Alternative B, which stated that "Defendants have established one or more of their affirmative defenses and are not liable...". However, the jury's responses to those special interrogatories awarded Burger King Corporation "damages" of only $1.00 on the promissory notes (as to which the uncontroverted evidence established that Petitioners' indebtedness exceeded $1,000,000, including interest), and only $100,000 with respect to the accounts receivable (as to which the uncontroverted evidence established that Petitioners' indebtedness exceeded $600,000, including interest).[3]

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[2] "C.A. App." refers to Burger King Corporation's Appendix in the Court of Appeals.

[3] Petitioners did not dispute the fact that they had executed and delivered the promissory notes, and had incurred all of the financial obligations which were reflected by the accounts receivable. There also was no controversy between the parties as to the amounts which were due and owing on the promissory

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Burger King Corporation subsequently filed motions for clarification or for judgment *n.o.v.*, seeking an award of the full amounts which were due and owing on the promissory notes and the accounts receivable. The trial court denied those motions, but concluded that "an alternative form of relief is appropriate". October 31, 1980 Order, Pet. App. A48. More particularly, the trial court stated (*ibid.*):

> "The awards of money damages in favor of Burger King on both the promissory notes and the accounts receivable establish liability against the defendants. The verdict award of \$1.00 on promissory notes with a face value of close to \$900,000.00 and the verdict award of \$100,000.00 on accounts receivable with a book value of over \$500,000.00 are contrary to the weight of the evidence presented at trial. Therefore, a new trial shall be held on the issue of damages alone with respect to the promissory notes covered in Special Issue No. 1 and the accounts receivable covered in Special Issue No. 2."[4]

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notes and the accounts receivable. Petitioners did, however, assert several affirmative defenses to Burger King Corporation's claims on the notes and accounts receivable; as noted *supra*, those affirmative defenses were essentially identical to claims which Petitioners asserted in their counterclaim (and which the jury expressly rejected in responses to various special interrogatories)—*i.e.*, Petitioners alleged (1) that they had been induced to execute the promissory notes by fraud and by the exercise of undue economic coercion, and (2) that Burger King Corporation's purported wrongful termination of the Pittsburgh Development Agreement had prevented Petitioners from paying the amounts which they owed on the promissory notes and the accounts receivable.

[4] Burger King Corporation subsequently obtained summary judgment for the full amounts which were due and owing on the promissory notes and the accounts receivable. May 21, 1981 Order, Pet. App. A52.

In their appeal to the Eleventh Circuit, Petitioners challenged the trial court's decision that the new trial with respect to the promissory notes and the accounts receivable would involve *only* a determination of the *amounts* of Burger King Corporation's recovery on those notes and accounts. Petitioners contended that the trial court had abused its discretion by not ordering a plenary new trial on all issues. Petitioners argued that the issues relating to Petitioners' *liability* to Burger King Corporation could not be separated from the issues relating to the *amounts* of Burger King Corporation's recovery on the promissory notes and accounts receivable, and that the jury had rendered an improper compromise verdict.

The Eleventh Circuit, after discussing the applicable case law, concluded that Petitioners' contentions were unsupported by the record (Pet. App. A18-A19):

> "* * * The record before us confirms our belief that the liability and damages issues were also separable in this instance. First, and foremost, the jury repeatedly found that Mason [Petitioners] failed to establish its affirmative defenses, the only basis upon which Mason could escape liability. It did so in finding against Mason on the promissory notes and accounts; it rejected the affirmative defenses again when they were asserted as grounds for setting aside the terminations of the development agreements; and once more when they constituted the foundation for the counterclaim against BKC. We can come to no other conclusion than that the jury did not believe Mason's allegations of economic coercion, fraudulent inducement or wrongful termination of the development agreements. Having clearly convinced the jury that these claims lacked merit, BKC should not have to defend against them again. Second, the record contains absolutely no indicia of a compromise other than the low amount of damages. After a long, protracted trial, the jury required only two to three hours to

reach its verdict. It obviously was not deadlocked. The jury did not request additional instructions or attempt to qualify its verdict in any manner. Finally, as BKC points out, the award could be explained by reference to the use of the term 'damages' on the special interrogatories. It is possible that the jury thought that BKC would receive payment on the promissory notes and accounts based solely on their finding that BKC was entitled to recover for these items and, therefore, any additional finding of 'damages' would simply amount to a duplication.* The 'totality' of the circumstances' simply do not point to a compromise verdict. Viewed in this factual and procedural setting, the district court did not abuse its discretion in ordering the partial new trial."

* [Footnote by Eleventh Circuit.] "BKC offered alternative verdict forms which asked the jury to designate the amount of Mason's 'liability' on the various obligations. The term 'liability' would have more accurately reflected the nature of the recovery. Thus, although the proffer was rejected, BKC did attempt to avoid the potentially confusing reference to 'damages.' "

2. The controversy between the parties regarding Burger King Corporation's termination of Petitioners' 27 franchise agreements arose after Burger King Corporation sent Petitioners a written notice terminating those franchise agreements. The notice of termination stated that Burger King Corporation was terminating the franchise agreements because Petitioners had committed specified acts which, according to the express provisions of those franchise agreements, gave Burger King Corporation a right of termination.

At the conclusion of the 1980 trial, the jury responded ambiguously to the special interrogatory which asked it to decide whether Burger King Corporation had properly terminated all, none or some of the 27 franchise agreements.

Special Issue No. 5, Pet. App. A123.[5] Burger King Corporation then moved for a judgment *n.o.v.* that it had properly terminated each of the 27 franchise agreements, or, in the alternative, for a new trial with respect to the question whether it had properly terminated each of those franchise agreements. The trial court denied Burger King Corporation's motions with respect to the question whether it had properly terminated each of the twelve franchise agreements covering Petitioners' Pittsburgh area restaurants, but ordered a new trial with respect to the question whether Burger King Corporation had properly terminated each of Petitioners' other fifteen franchise agreements. October 31, 1980 Order, Pet. App. A48-49. Because the trial court was unable to determine from the jury's ambiguous response to

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[5]That special interrogatory directed the jury to select one of three alternative responses. Alternative A declared that Burger King Corporation had terminated *all* 27 franchise agreements *properly*; Alternative B declared that Burger King Corporation had terminated *all* 27 franchise agreements *improperly*. Alternative C declared that Burger King Corporation had terminated *some* of the franchise agreements *properly* and *some improperly*; Special Issue No. 5 further provided that if the jury selected Alternative C, the foreperson was to list each of the 27 franchise agreements in one or the other of two columns—*i.e.*, the "Terminated Properly" column or the "Terminated Improperly" column.

The jury selected Alternative C, but failed to list each of the 27 franchise agreements in one or the other of the two columns. Rather, the foreperson wrote the word "none" in the "Terminated Properly" column, and listed the twelve franchise agreements covering Petitioners' Pittsburgh area restaurants in the "Terminated Improperly" column, but did not list the other fifteen franchise agreements in either column. Thus the jury's response was ambiguous with respect to the question whether Burger King Corporation had properly terminated the fifteen franchise agreements which the foreperson did not list either in the "Terminated Properly" column or in the "Terminated Improperly" column.

the special interrogatory what the jury actually had decided with respect to the termination of those fifteen franchise agreements, the court concluded that the interests of justice would be better served by a new trial than by speculation and conjecture regarding the jury's intention. That subsequent trial culminated in adjudications that Burger King Corporation had properly terminated thirteen franchise agreements covering restaurants which Petitioners operated outside of the Pittsburgh area. December 16, 1981 Final Judgment, Pet. App. A77.

In their appeal to the Eleventh Circuit, Petitioners challenged the trial court's decision ordering a new trial with respect to the question whether Burger King Corporation had properly terminated the fifteen franchise agreements covering Petitioners' restaurants outside of the Pittsburgh area. Petitioners contended that the trial court abused its discretion when it refused to construe the jury's ambiguous response to Special Issue No. 5 as a decision that Burger King Corporation had improperly terminated all 27 of Petitioners' franchise agreements.

The Eleventh Circuit, after discussing each of the precedents on which Petitioners rely in this Court, concluded that the record did not support Petitioners' contention. In reaching that conclusion, the Eleventh Circuit emphasized the ambiguous nature of the jury's response to Special Issue No. 5, pointing out that (1) the jury did not select Alternative Response B (which declared simply that all 27 terminations had been improper), and (2) the jury listed twelve of the franchise agreements in the "Terminated Improperly" column of Alternative C, but did not list any of the other fifteen franchise agreements either in the "Terminated Properly" column or in the "Terminated Improperly" column (Pet. App. A22-A23):

"* * * Without doubt, the response to special issue #5 was both [internally] inconsistent and ambiguous. If the jury intended to find that all of the franchises had been

wrongfully terminated, it could have selected alternative (b)—it did not. Thus, the choice of alternative (c) was inconsistent with its answer that none of the franchises had been properly terminated. More significantly, the answer does not resolve the disposition of over half of the franchises. As the district court observed, it is not clear what the jury found, if anything, with respect to the omitted franchises. The trial court properly declined to supply facts submitted for the jury's determination but left unanswered. *Guidry*, 598 F.2d 402. Inconsistent or ambiguous verdicts must be reconciled only if that can be accomplished from a *fair* reading of the verdict. *Griffin*, 471 F.2d at 915. Faced with this incompatible answer, we have no criticism of the district court's exercise of its discretion in this instance."

ARGUMENT

Although Petitioners assert repeatedly that the Eleventh Circuit's decision is inconsistent with prior decisions of this Court and of other Circuits, nothing could be further from the truth. Indeed, as will be demonstrated *infra*, the Eleventh Circuit's opinion discussed at length the precedents on which Petitioners primarily rely, and carefully applied to the facts of this case all of the pertinent legal principles which were articulated therein. Petitioners have no proper basis for criticizing the rules of law on which the Eleventh Circuit premised its decision. Rather, Petitioners simply are dissatisfied with the result which ensued when the Eleventh Circuit applied those well-settled rules of law to the unique facts of the instant case. Such dissatisfaction with the resolution of a routine private commercial dispute does not justify the granting of a petition for certiorari.

1. Petitioners first contend that the Eleventh Circuit acted in "direct conflict with decisions of this Court, the Fifth Circuit and the Second Circuit" by holding that the trial court properly exercised its discretion in ordering a partial new trial to determine the *amount* of Burger King

Corporation's recovery on the promissory notes and the accounts receivable. Pet. 8. Petitioners premise that contention on the speculative assumption that the jury returned an improper compromise verdict—an assumption which, as the Eleventh Circuit found, is not supported by the record. According to Petitioners, the Eleventh Circuit should have ordered a plenary new trial with respect to the question of Petitioners' *liability* on the promissory notes and the accounts receivable, so that Petitioners could reassert all of the affirmative defenses and counterclaims which the jury had expressly rejected in its responses to the special interrogatories.[6]

Despite Petitioners' rhetoric regarding a "compromise verdict", it is clear that (as the Eleventh Circuit pointed out, Pet. App. A19) the jury's verdict with respect to Burger King Corporation's claims on the promissory notes and the accounts receivable was affected by the misleading use of the word "damages" in Special Issues Nos. 1 and 2. The special interrogatories which Burger King Corporation had proposed did not use that word; rather, those proposed special interrogatories asked the jury to decide whether Burger King Corporation had prevailed on its claims with respect to the promissory notes and the accounts receivable, and thereafter directed the jury to specify the amounts which Burger King Corporation was entitled to recover on each of those claims. However, the trial court rejected Burger King

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[6]Significantly, Petitioners urge this Court (as they urged the Eleventh Circuit and the trial court) to accept a contrived interpretation of the jury's responses to Special Issues Nos. 1 and 2 which would effectively render those responses inconsistent with the jury's unequivocal responses to the special interrogatories relating to Petitioners' counterclaims—even though Petitioners themselves rely heavily on this Court's statement that "Where there is a view of the case that makes the jury's answers to special interrogatories consistent [with each other], they must be resolved that way". *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962) (Pet. 13), which is discussed *infra*, pp. 19-21.

Corporation's proposed special interrogatories and adopted a more abbreviated form which directed the jury to determine the amounts of "damages" that Burger King Corporation was entitled to recover on the promissory notes and the accounts receivable. Pet. App. A14, A19.

In its responses to the special interrogatories which the trial court propounded, the jury found specifically that Burger King Corporation had prevailed on its claims on the promissory notes and accounts receivable, and that Petitioners had not established any affirmative defense to those claims. However, because those special interrogatories directed the jury to specify the amounts of "damages" to be awarded to Burger King Corporation, rather than the "amounts of Defendants' indebtedness" or the "amounts due and owing", the jury apparently believed that it was supposed to award "damages" to Burger King Corporation *in addition to* the uncontroverted amounts which Petitioners owed on the promissory notes and the accounts receivable. Consequently, the jury's responses to Special Issues Nos. 1 and 2 awarded to Burger King Corporation *damage* amounts ($1.00 on the promissory notes and $100,000 on the accounts receivable) which the jury apparently intended as compensatory damages *over and above* the uncontroverted amounts of Petitioners' indebtedness to Burger King Corporation (more than $1,000,000 on the promissory notes, and more than $600,000 on the accounts receivable).[7]

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[7] The particular "damage" amounts which the jury specified in its responses to the special interrogatories confirm that the jury believed that it was awarding compensatory damages *in addition to* the uncontroverted amounts which Petitioners owed to Burger King Corporation. In response to the special interrogatory which dealt with the unpaid accounts receivable, the jury awarded Burger King Corporation "damages" of $100,000; in closing argument Burger King Corporation's counsel had stated that Petitioners "saved" that amount of interest by failing to pay $500,000 in non-interestbearing accounts receivable for one year, at a time when the prime rate was approximately 20%. C. A. App. Ex. H. That $100,000 damage award

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in considering Petitioners' contention that the trial court had abused its discretion by not ordering a plenary new trial with respect to the question of Petitioners' liability on the promissory notes and the accounts receivable, the Eleventh Circuit discussed at length the precedents on which Petitioners primarily rely. In particular, the Eleventh Circuit reviewed, and quoted from, *Gasoline Products Co., Inc.* v. *Champlin Refining Co.*, 283 U.S. 494, 500 (1931), where this Court held that a limited new trial is appropriate where the "issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." Applying that well-established principle to the instant case, the Eleventh Circuit held that the issue as to which the trial court ordered a new trial (*i.e.*, determination of the amount of Burger King Corporation's recovery on the promissory notes and the accounts receivable) was not inextricably interwoven with the issues as to which the jury had rendered unequivocal determinations that were overwhelmingly supported by

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also approximated the $93,000 amount which a witness had computed as the interest that Petitioners would have paid if they had borrowed the sums necessary to make timely payments on the accounts receivable. R., Vol. 29, pp. 1206–07. (During its deliberations, the jury specifically requested access to the chart which reflected those computations, and that chart was moved into the jury room pursuant to agreement of counsel.) Thus the $100,000 "damages" award apparently was intended to compensate Burger King Corporation for the damages which it suffered (in "lost interest") as a result of Petitioners' non-payment of the amounts due on the accounts receivable. The $1.00 in "damages" which the jury awarded to Burger King Corporation in response to the special interrogatory relating to the promissory notes apparently reflected the jury's conclusion that, because the uncontroverted amounts due on the promissory notes already included interest computed at the rates stated in those notes, Burger King Corporation was not entitled to an additional sum as compensation for Petitioners' non-payment of those amounts.

the evidence.[*] The Eleventh Circuit correctly premised that

[*]The differences between the facts of this case and the facts presented in *Gasoline Products* highlight the propriety of the decisions of the Eleventh Circuit and the trial court herein. The defendant in *Gasoline Products* had obtained a jury verdict on a counterclaim for breach of contract. The Court of Appeals held that the jury instructions with respect to the measure of damages on the counterclaim had been erroneous, and ordered a new trial solely to determine the amount of damages which the defendant was to recover on its counterclaim. 283 U. S. at 496. This Court reversed, on the ground that computation of the defendant's damage recovery on its counterclaim depended on a determination of what the alleged contract between the parties actually provided. Because the first jury's verdict did not include such a determination, a new jury trial to determine the amount of damages necessarily had to include a jury determination of factual issues which related directly to the question whether the plaintiff actually had breached the contract. As a result, this Court concluded that the computation of damages was so inextricably "interwoven" with the issue of liability that "there should be a new trial of all the issues raised by the counterclaim". *Id.* at 501. That rationale similarly supported the decision of the Fifth Circuit in *Fury Imports, Inc.* v. *Shakespeare Co.*, 554 F.2d 1376 (5th Cir. 1977), on which Petitioners also rely. Pet. 9. In *Fury* the Fifth Circuit concluded that error in the computation of damages could not be separated from the issue of liability, because ". . . the question of causation is so intimately tied to the question of damages". 554 F.2d at 1388.

In the instant case, on the other hand, the issues of liability and damages were not inextricably "interwoven". The jury expressly rejected all of Petitioners' affirmative defenses to Burger King Corporation's claims on the promissory notes and the accounts receivable, and also expressly rejected the counterclaims which Petitioners premised on the same factual and legal theories which were the basis of those affirmative defenses. Moreover, the jury also determined expressly that Burger King Corporation had prevailed on its claims with respect to the promissory notes and the accounts receivable. Because the amounts which Burger King Corporation was entitled to recover on the promissory notes and the accounts

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conclusion on the jury's express findings (in its responses to the special interrogatories) that (1) Burger King Corporation had prevailed on its claims with respect to the promissory notes and the accounts receivable, (2) Petitioners had not established any affirmative defense to Burger King Corporation's claims on the notes and accounts receivable, and (3) Petitioners had failed to establish the counterclaims which were essentially identical to the affirmative defenses that Petitioners had asserted in opposition to Burger King Corporation's claims on the promissory notes and accounts receivable.

The Eleventh Circuit also held that the "compromise verdict" decisions on which Petitioners rely in this Court are inapposite because the record in the instant case does not indicate that there was a compromise verdict. Despite Petitioners' assertions to the contrary, the law is well-settled that mere speculation is not a proper basis for concluding that a jury has returned an improper compromise verdict. Where, as in the instant case, there is ample evidentiary support for a jury's verdict on liability, that verdict can be set aside as an improper compromise verdict only if "it appears by legally *competent* proof or deduction that the verdict is the result of compromise". 6A *Moore's Federal Practice* § 59.08[4] (2d Ed. 1983) (emphasis in original). As the Eleventh Circuit emphasized (Pet. App. A16-A17):

> "* * * [A] review of the cases from the former Fifth Circuit Court of Appeals establishes that a nominal or inadequate finding of damages by itself does not automatically mandate the conclusion that the award was

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receivable could readily be determined without any retracing of the ground which the 1980 jury covered when it decided that Burger King Corporation had prevailed on its claims with respect to the notes and the accounts, the trial court properly held that the new trial should involve *only* a determination of the amount of Burger King Corporation's recovery thereon.

the product of a compromise verdict. *See, e.g., Hadra* v. *Herman Blum Consulting Engineers*, 632 F.2d 1242, 1247 (5th Cir. 1980), *cert. denied*, 451 U.S. 912, 101 S.Ct. 1983, 68 L.Ed.2d 301 (1981); *Davis* v. *Becker & Associates, Inc.*, 608 F.2d 621 (5th Cir. 1979); *Bassett Furniture Industries of North Carolina, Inc.* v. *NVF Co.*, 576 F.2d 1084, 1094 (5th Cir.), *reh. denied with opinion*, 583 F.2d 778 (5th Cir. 1978); *Parker* v. *Wideman*, 380 F.2d 433, 437 (5th Cir. 1967). Indeed, if inadequate damages was the sole test for a compromise, Rule 59(a) would have little or no purpose. Rather, our inquiry must concentrate on any indicia of compromise apparent from the record, *Hatfield*, 396 F.2d 721, 723-24, and other factors which may have caused the jury to return a verdict for inadequate damages. *See Hadra*, 632 F.2d 1242, 1244 n.1. Only if the "totality of the circumstances" indicates that the issue sought to be excluded by a partial new trial is not separable from the error in the damage award, will a plenary new trial be authorized. *See Williams* v. *Slade*, 431 F.2d 605, 609 (5th Cir. 1970)."

Williams v. *Slade*, 431 F.2d 605 (5th Cir. 1970), to which the Eleventh Circuit referred, is one of the principal cases on which Petitioners rely in this Court. Pet. 8-9. But, as the Eleventh Circuit pointed out, the record in the instant case (unlike the "totality of the circumstances" in *Williams* v. *Slade*) established that a plenary new trial was not justified, and that it would have been a waste of judicial resources to grant Petitioners yet another "day in court" with respect to the affirmative defenses and counterclaims that the jury had expressly rejected. In reaching that conclusion, the Eleventh Circuit also rejected as inapposite another of the cases on which Petitioners rely, *Lucas* v. *American Manufacturing Co.*, 630 F.2d 291 (5th Cir. 1980). As the Eleventh Circuit's opinion noted, the Fifth Circuit's decision in that case was premised on the fact that the trial court had admonished the jury to reach a verdict quickly because a hurricane was approaching—a fact which led the Fifth Circuit to conclude

"that in their haste to decide the case before the arrival of the hurricane, the jurors probably compromised, agreeing to find liability only if the damages were kept to a minimum". Pet. App. A17. And, as the Eleventh Circuit concluded, the "compromise verdict" hypothesis must be rejected where, as here, "the record discloses another basis for the improper award". *Id.* at A18.[9]

As noted *supra*, the jury in this case expressly determined (in response to several of the special interrogatories) that Petitioners had failed to establish any of their affirmative defenses to Burger King Corporation's claims on the promissory notes and the accounts receivable. Those affirmative defenses were the only theories which Petitioners suggested as a basis for avoiding liability. Moreover, as the Eleventh Circuit emphasized, the jury made those same determinations repeatedly—(1) in ruling that Burger King Corporation had prevailed on its claims on the promissory notes and the accounts receivable, (2) in rejecting Petitioners' affirmative defenses when Petitioners asserted those affirmative defenses as grounds for challenging the termination of the Pittsburgh and Kansas City Development Agreements, and (3) in rejecting the same contentions when Petitioners advanced them as "the foundation for the counterclaim".

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[9]The Eleventh Circuit's decision also is consistent with the rule of law articulated in *Ajax Hardware Mfg. Corp.* v. *Industrial Plants Corp.*, 569 F.2d 181 (2d Cir. 1977), another of the cases on which Petitioners rely in their strained effort to conjure up a conflict between the Circuits. Pet. 10. In *Ajax*, as in this case, the Court of Appeals noted that "evidence of a compromise verdict must be considered" in determining whether a new trial limited to the issue of damages is appropriate. 569 F.2d at 185. The Court in *Ajax*, like the Eleventh Circuit here, also emphasized the extent of the trial court's discretion in "choosing between a partial and a complete new trial". *Id.* *Ajax* thus supports the well-considered reliance, by the trial court and by the Eleventh Circuit, on all of the factors in this case which indicate that the jury did *not* render a compromise verdict.

Pet. App. A18. On the basis of those jury determinations, the Eleventh Circuit stated (*Id.* at A18-A19):

> "* * * We can come to no other conclusion than that the jury did not believe Mason's allegations of economic coercion, fraudulent inducement or wrongful termination of the development agreements. Having clearly convinced the jury that these claims lacked merit, BKC should not have to defend against them again. Second, the record contains absolutely no indicia of a compromise other than the low amount of damages. After a long, protracted trial, the jury required only two to three hours to reach its verdict. It obviously was not deadlocked. The jury did not request additional instructions or attempt to qualify its verdict in any manner. Finally, as BKC points out, the award could be explained by reference to the use of the term 'damages' on the special interrogatories. It is possible that the jury thought that BKC would receive payment on the promissory notes and accounts based solely on their finding that BKC was entitled to recover for these items, and, therefore, any additional finding of 'damages' would simply amount to a duplication. [Footnote omitted.] The 'totality of the circumstances' simply do not point to a compromise verdict. Viewed in this factual and procedural setting, the district court did not abuse its discretion in ordering the partial new trial."

2. Petitioners also contend (Pet. 12) that the Eleventh Circuit's decision is in conflict with ***Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.***, 369 U.S. 355, 364 (1962), where this Court stated that "Where there is a view of the case that makes the jury's answers to special interrogatories consistent [with each other], they must be resolved that way." According to Petitioners, the jury's ambiguous response to Special Issue No. 5 constituted an inconsistency in the jury's answers to the special interrogatories, and the trial court was required as a matter of law to interpret that ambiguous

response as an unequivocal determination that all 27 franchise agreements had been terminated improperly.

In fact, neither *Atlantic & Gulf Stevedores, Inc.* nor the other case cited by Petitioners on this issue—*Miller v. Royal Netherlands Steamship Company*, 508 F.2d 1103 (5th Cir. 1975)—involved an ambiguous jury response to a single special interrogatory. On the contrary, in those cases the juries' answers to the various special interrogatories were clear and unambiguous; however, in each case the answers to some special interrogatories appeared to contradict the answers to other special interrogatories. 369 U.S. at 357; 508 F.2d at 1106-07. In the instant case, on the other hand, there was no answer to a special interrogatory which contradicted, or was inconsistent with, the jury's response to Special Issue No. 5. The trial court ordered a new trial with respect to the question whether Burger King Corporation had properly terminated the fifteen franchise agreements covering restaurants outside of the Pittsburgh area *precisely because the jury's response to Special Issue No. 5 was ambiguous*; the trial court could not determine what the jury actually intended by its response to that special interrogatory, and there was no response to any other special interrogatory which clarified that ambiguity (or which was inconsistent with any possible interpretation of the jury's response to Special Issue No. 5). Consequently, the unassailable Seventh Amendment principles which Petitioners cite are inapposite, because those principles do not require that a court rely on sheer speculation or conjecture as a basis for interpreting an ambiguous jury response to a special interrogatory.

Under the circumstances, it manifestly was proper for the trial court to conclude that "it would not serve the best interests of justice for the Court to attempt to read the jury's mind in an effort to resolve this ambiguity [*i.e.*, the ambiguity in the jury's response to Special Issue No. 5]." October 31, 1980 Order, Pet. App. A47, A49. That ruling is completely in accord with the long established principle that

"The court has the power and duty to order a new trial whenever, in its judgment, the action is required in order to prevent injustice". 11 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2805 at 38 (1973). As the Eleventh Circuit concluded, the trial court did not abuse its discretion by ordering a new trial on the franchise agreement termination issue, instead of endorsing Petitioners' speculative effort to read the minds of the jurors. The Eleventh Circuit discussed both of the above-cited cases on which Petitioners rely, but properly concluded that those cases are inapposite here, because the jury's response to Special Issue No. 5 was ambiguous and did not "resolve the essential facts" in a manner which provided a sound basis for the entry of judgment. Pet. App. A22. The Eleventh Circuit's reasoning on this point is entirely consistent with this Court's decision in *Atlantic & Gulf Stevedores* (*Id.* at A22-A23):

> "* * * Without doubt, the response to special issue #5 was both [internally] inconsistent and ambiguous. If the jury intended to find that all of the franchises had been wrongfully terminated, it could have selected alternative (b)—it did not. Thus, the choice of alternative (c) was inconsistent with its answer that none of the franchises had been properly terminated. More significantly, the answer does not resolve the disposition of over half of the franchises. As the district court observed, it is not clear what the jury found, if anything, with respect to the omitted franchises. The trial court properly declined to supply facts submitted for the jury's determination but left unanswered. *Guidry*, 598 F.2d 402. Inconsistent or ambiguous verdicts must be reconciled only if that can be accomplished from a *fair* reading of the verdict. *Griffin*, 471 F.2d at 915. Faced with this incompatible answer, we have no criticism of the district court's exercise of its discretion in this instance."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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